

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

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Amendment of Section 2.106 of the
Commission's Rules to Allocate
Spectrum for 2 GHz for Use
by the Mobile-Satellite Service)

ET Docket No. 95-18

To: The Commission)

**JOINT COMMENTS ON OPPOSITIONS TO
PETITIONS FOR FURTHER LIMITED RECONSIDERATION**

The Association for Maximum Service Television, Inc. ("MSTV") and the National Association of Broadcasters ("NAB")¹ (collectively, "Joint Broadcasters") file these comments in reply to the Oppositions and Comments filed in response to the Petition for Further Limited Reconsideration of ICO Services Limited ("ICO") (the "Petition") and the Emergency Petition for Further Limited Reconsideration of BT North America Inc., Hughes Space and Communications International, ICO, Telecommunicaciones de Mexico and TRW Inc. (the "Emergency Petition"). Through these comments, the Joint Broadcasters express their support for the Oppositions of UTC, the Telecommunications Association ("UTC"); the Association of American Railroads ("AAR"); and the American Petroleum Institute ("API"). We support in part and oppose in part the Consolidated Comments of Iridium LLC ("Iridium").

¹ MSTV is a non-profit trade association of local broadcast television stations committed to achieving and maintaining the highest technical quality for the local broadcast system. NAB is a non-profit, incorporated association of radio and television stations and networks that serves and represents the American broadcast industry.

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The Petition asks the Commission to reconsider for a second time its decision to apply the relocation compensation principle from the *Emerging Technologies* proceeding to the relocation of Broadcast Auxiliary Service ("BAS") and fixed microwave service ("FS") licensees by new entrants in the Mobile-Satellite Service ("MSS"). The Petition also asks the Commission to condition all new BAS licenses (and BAS and FS renewals) issued after the March 1997 *First Report & Order/FNPRM*² on the licensee's payment of its own relocation costs.³ The Petition asserts that reconsideration is warranted because the application of the compensation principle to the BAS and FS relocations and the failure to condition new licenses on self-relocation impermissibly grant BAS and FS licensees "property interests" in 2 GHz spectrum in violation of the Communications Act. The Joint Broadcasters agree with the UTC, AAR and API Oppositions that the Petition must be either dismissed as repetitious or rejected on its merits.

² First Report and Order and Further Notice of Proposed Rulemaking, *In re Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, ET Docket No. 95-18, 12 FCC Rcd 7388, 7417-18 (1997) ("*First Report & Order/FNPRM*").

³ The Emergency Petition similarly asks the Commission to condition all new BAS licenses granted after March 1997 on the licensee's payment of its own relocation costs, arguing that the Commission raised the issue in its *First Report & Order/FNPRM* and thus should have resolved it, in favor of a license freeze or relocation condition consistent with those imposed in the *Emerging Technologies* and other proceedings, in the Memorandum Opinion and Order and Third Notice of Proposed Rulemaking and Order, ET Docket No. 95-18, FCC 98-309 (rel. Nov. 27, 1998) ("*MO&O/Third NPRM*"). This argument should be readily dismissed. The Commission failed to resolve the license freeze issue in the *MO&O/Third NPRM* for good reason: the allocation of spectrum to BAS was disrupted by intervening congressional action that forced the Commission to revisit both the BAS allocation *and* the question of how the *Emerging Technologies* principles, including any limitations on new licenses, would be applied to the BAS relocation. *Id.* ¶ 30-32, 53. Thus, the license freeze issue is being fully briefed in the comments and reply comments on the *Third NPRM*, see, e.g., Joint Reply Comments of the Association for Maximum Service Television, Inc. and the National Association of Broadcasters, ET Docket No. 95-18, at 18-21 (Mar. 4, 1999), and there is no reason for the Commission to resolve it in response to the Emergency Petition. Accordingly, the Joint Broadcasters oppose that portion of the Consolidated Comments of Iridium LLC, ET Docket No. 95-18 (Feb. 22, 1999) ("*Iridium Comments*"), that urges the Commission to grant the Emergency Petition.

As the Oppositions argue, the Petition is untimely because it objects to a decision initially made by the Commission in 1997. The Commission's Rules permit a second petition for reconsideration only if it objects to a *new or modified rule* adopted in the order resolving the initial petition for reconsideration.⁴ Here, the Petition objects to a decision that was carefully considered and *affirmed* in the order resolving the first petition. Moreover, as the API Opposition observes, the Petition is not based on "any new facts or changed circumstances which arose since the filing of [ICO's] first petition for reconsideration. Rather, the ICO Petition is founded entirely upon a legal argument that could have been raised previously."⁵ Therefore, consideration of the Petition would serve only to delay further this already prolonged proceeding, and the Petition accordingly should be dismissed as repetitious.

On the merits, the Petition should be denied. The Petition contends that requiring new MSS entrants to compensate incumbent BAS and FS licensees for moving to new spectrum and refusing to condition new BAS and FS licenses on the licensees' payment of relocation expenses give the BAS and FS licensees "property rights" in 2 GHz spectrum, in contravention of the Commission's obligation to maintain ownership of the spectrum in the government and to manage the spectrum in the public interest. But, as the Oppositions contend, the imposition of a

⁴ See 47 C.F.R. § 1.429(h)(i) ("Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, *to the extent of such modification*, subject to reconsideration in the same manner as the original order. *Except in such circumstance, a second petition for reconsideration may be dismissed by the staff as repetitious.*") (emphasis added); Report and Order, *In re Amendment of Section 1.106(k)(3) and Part O of the Rules and Regulations to Provide for Staff Dismissal of Repetitious Petitions for Reconsideration*, 2 FCC 2d 572 (1966) ("There have been instances where successive petitions for reconsideration have been filed after the initial petition for reconsideration was dismissed or denied. *Since such repetitious petitions unnecessarily prolong litigation, they should be routinely dismissed.*") (emphasis added).

⁵ Opposition of the American Petroleum Institute, ET Docket No. 95-18, at 4 (Feb. 22, 1999) ("API Opposition").

relocation compensation obligation on new MSS entrants does not constitute an abdication of the Commission's duty to manage the spectrum, nor does it give incumbent licensees "property rights" in the spectrum they are required to vacate. Instead, the compensation requirement is a fair and equitable spectrum management tool that has made it possible for new services to gain access to spectrum while existing, still-valuable services continue to operate with minimal disruption.⁶

Thus, in this proceeding the Commission determined that it would be in the public interest to make 2 GHz spectrum available for new technologies, but *only if* those services already making good use of the spectrum and serving the public interest were not unduly disrupted. The decision to prevent such disruption by requiring new entrants to pay relocation costs as the price of doing business in the previously occupied spectrum is a reasonable and permissible exercise of the Commission's authority. It does not, as the Petition contends, reward BAS and FS incumbents "based solely on their past occupancy of the spectrum."⁷ Indeed, it is no reward at all. Instead, as in the *Policy Statement of Comparative Hearings Involving Regular Renewal Applicants* cited in the Petition, the relocation principle acknowledges the "solid record

⁶ See Opposition of UTC, the Telecommunications Association, ET Docket No. 95-18, at 6 (Feb. 22, 1999) ("The relocation right is . . . a spectrum management tool that encourages spectral efficiency by promoting sharing and equitably imposes costs on those licensees that directly benefit from the relocation of the incumbent systems."); Opposition of Association of American Railroads, ET Docket No. 95-18, at 10 (Feb. 22, 1999) (arguing that relocation compensation principle is "sound public policy" that is "intended to enable the new licensees to have access to the spectrum in a reasonable time frame while preventing disruption to existing operations and minimizing the impact of relocation on the incumbents"); *API Opposition*, at 7 ("To the contrary, the Commission clearly has exercised and maintained its control [over the electromagnetic spectrum] through the reallocation of [2 GHz spectrum] to MSS, the potential involuntary relocation of incumbent systems and the retention of the right to settle any disputes that arise during the relocation process."). And, of course, the Commission has required newcomers to pay the relocation costs of incumbents on prior occasions, such the PCS proceeding.

⁷ Petition, at 13.

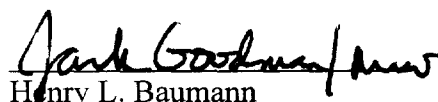
of operation in the public interest” of the incumbent services and assures that that record is not interrupted or terminated by the advent of unproven new services. This is clearly in accord with the Commission’s obligation to assure that electromagnetic spectrum is utilized in the public interest.

Moreover, the conclusion that the relocation compensation principle protects the public interest rather than conferring property rights in spectrum is reinforced by the fact that the required compensation does not reimburse incumbent licensees for the value of the spectrum vacated. Compensation only makes it possible for the incumbents to continue to provide services to the public, albeit in alternative spectrum.

In accordance with the foregoing, the Commission should deny the ICO Petition for Further Reconsideration and once again affirm the application of the *Emerging Technologies* relocation compensation principle to the relocation of all BAS and FS licensees.

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CERTIFICATE OF SERVICE

I, Mary Newcomer Williams, hereby certify that a copy of the foregoing Joint Comments on Oppositions to Petitions for Further Limited Reconsideration has been served by first class mail, postage prepaid, this 4th day of March, 1999 on:

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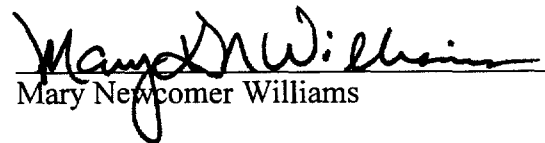
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